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No. 91-810

In The
Supreme Court of the United States
October Term, 1991

City of Burlington,
Petitioner,
v.
Ernest Dague, Sr., *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals
for the Second Circuit

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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April 13, 1992

Wilson - Epes Printing Co., Inc. - 789-0096 - Washington, D.C. 20001

QUESTION PRESENTED

Whether a court, in determining a reasonable attorney's fee award under Section 7002(e) of the Solid Waste Disposal Act, 42 U.S.C. § 6972(e), or Section 505(d) of the Federal Water Pollution Control Act (Clean Water Act), 33 U.S.C. § 1365(d), may enhance the fee award above the lodestar amount under circumstances where attorneys in the private market would demand enhanced compensation in order to assume the risk of nonpayment?

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INTEREST OF *AMICUS CURIAE*

The American Bar Association ("ABA") is the nation's leading professional organization of lawyers, numbering more than 365,000 members throughout the United States. As the national organization of the bar, the ABA has long promulgated standards of professional responsibility, including standards governing the fees that attorneys may permissibly charge for their services. The ABA's membership includes lawyers who represent plaintiffs on a fee-shifting basis, lawyers who represent plaintiffs on a contingency basis, and lawyers who represent defendants. Although the perspectives of these members differ, it is generally recognized that, where a

lawyer's compensation depends upon a client's success, the lawyer may permissibly charge a larger fee than where his or her compensation is not contingent on success. In fee-shifting cases, this means that a reasonable fee may include a contingency premium.

Although the ABA takes no position on the propriety of the specific enhancement awarded in this case, it has encouraged the development of federal fee-shifting statutes,[1] and believes its ethical standards should help guide judicial determinations concerning the reasonableness of fees awarded under those statutes. For this reason, the ABA participated as an *amicus curiae* in *Pennsylvania* v. *Delaware Valley Citizens' Council For Clean Air*, 483 U.S. 711 (1987) ("*Delaware Valley II*"), the last case in which this Court addressed whether statutory fee awards may be enhanced to reflect the risk of nonpayment.[2]

SUMMARY OF ARGUMENT

Through fee-shifting provisions, Congress has sought to ensure "effective access to the judicial process" for selected federal claims. *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (internal quotation marks and citation

[1] *See, e.g.*, ABA, Summary of Action of the House of Delegates 19 (Annual Meeting, Aug. 5-6, 1980) (recommending legislation establishing uniform principles for regulation of attorney's fees in proceedings conducted before federal administrative agencies); ABA, Summary of Action of the House of Delegates 7 (Midyear Meeting, Feb. 13-15, 1978) (recommending legislation providing for recovery of reasonable attorney's fees in certain cases where private parties substantially prevail against the federal government); *see also* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 (1976), *reprinted in* 1976 U.S. Code Cong. & Admin. News 5908, 5909 (noting ABA's participation in hearings on Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988).

[2] Pursuant to Rule 37.3 of the Rules of this Court, the parties have consented to the ABA's filing as *amicus curiae* in support of respondents. Letters of consent have been filed with the Clerk of the Court.

omitted). Fee-shifting provisions serve this goal by replicating for federal claims the economic incentives that motivate attorneys to undertake representation in the private market. By assuring attorneys that, if their clients prevail, they will receive fees reflecting the prevailing market rates for the hours they have worked, fee-shifting eliminates the most immediate disincentive to representing federal claimants.

Nevertheless, compensation under such provisions remains contingent upon success, a fact that, in the private market, has long permitted attorneys to demand payment of a premium over standard billing rates to compensate for the economic risks of nonpayment. Thus, to replicate the compensation available in the private market, an award of "reasonable" attorney's fees must provide for enhancement in those circumstances where attorneys in the private market would charge a premium. Such enhancements further the statutory objective of attracting competent counsel to federal claims, and are fully consistent with Congress' express endorsement of, and longstanding acquiescence in, judicial awards of risk-based enhancements.

The objections to risk-based enhancements are not well founded. Compensation for the risk of nonpayment is neither subsumed within nor inconsistent with the lodestar calculus. Where a fee applicant can demonstrate that one of the determinations that governs attorney compensation in the private market—an unmitigatable risk of nonpayment—is not reflected in the lodestar, an upward adjustment is appropriate. Nor do such adjustments violate the statutory requirement that fees be awarded only to "prevailing" parties. Only a successful claimant can ever recover an award of enhanced fees; to the extent such awards are passed on to attorneys, they constitute compensation for assuming the economic risks of nonpayment, not a subsidy for losses the attorneys may or may not have suffered in other federal litigation.

The supposed difficulties of determining fee enhancements under the two-part test announced in Justice O'Connor's concurrence in *Delaware Valley II* do not justify a categorical refusal to consider whether market forces permit compensation for the risk of nonpayment. There are a number of objectively-verifiable factors courts can and do look to in order to determine whether the risks of nonpayment in an individual case could have been mitigated, and hence whether the fee applicant would have faced substantial difficulties retaining counsel. Nor are there insurmountable conceptual difficulties in determining whether a given relevant market compensates for the risk of nonpayment. To the contrary, such determinations are no more inherently difficult than those courts make in establishing the lodestar.

ARGUMENT

I. FEE-SHIFTING STATUTES ARE DESIGNED TO PERMIT PREVAILING FEDERAL LITIGANTS TO RECOVER THE SAME LEVEL OF ATTORNEY'S FEES THAT ECONOMIC FORCES IN THE PRIVATE MARKET PROVIDE, INCLUDING ENHANCEMENTS FOR THE RISK OF NONPAYMENT WHERE APPROPRIATE.

A. Through Fee-Shifting, Congress Sought to Replicate the Economic Incentives That Motivate Attorneys to Undertake Representation in the Private Market.

In a wide variety of statutes, including the Solid Waste Disposal Act and the Clean Water Act at issue in this litigation, Congress has authorized courts to award "reasonable" attorney's fees to a "prevailing" or "substantially prevailing" party.[3] Fee-shifting provisions rest on

[3] *See* Solid Waste Disposal Act § 7002(e), 42 U.S.C. § 6972(e) (court "may award costs of litigation (including reasonable attorney and expert witness fees) to any prevailing or substantially prevailing party"); Federal Water Pollution Control Act (Clean Water

the congressional recognition that prospective litigants seeking to vindicate interests created or protected by federal statutes often are unable to retain attorneys to represent them, and that the underlying federal interests these litigants seek to vindicate often do not give rise to damage recoveries that might induce attorneys to undertake contingent representation. Explaining the need for the Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988,[4] Congress noted that, "[b]ecause a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts." H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976).[5] Moreover, "while damages are theoretically available . . . immunity doctrines and special defenses, available only to public officials, preclude or severely limit the damage recovery." *Id.* at 9.[6]

Seeking to provide the economic incentives necessary to attract competent counsel to these federal claims, Con-

Act) § 505(d), 33 U.S.C. § 1365(d) (same). Examples of other statutes employing comparable language are set forth in the Brief for the United States as *Amicus Curiae* ("U.S. Br.") at 5 n.3.

[4] This Court has recognized that the standards for determining "reasonable" fees under Section 1988 apply equally to other federal fee-shifting provisions (*Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983)), and has looked to this statute and its legislative history to guide its interpretation of other fee-shifting enactments. *See, e.g., Independent Fed'n of Flight Attendants* v. *Zipes*, 491 U.S. 754, 758 n.2 (1989) (fee-shifting provisions of Title VII); *Pennsylvania* v. *Delaware Valley Citizens' Council for Clean Air*, 478 U.S. 546, 559-60 (1986) ("*Delaware Valley I*") (fee-shifting provisions of the Clean Water Act).

[5] *See also* S. Rep. No. 1011, 94th Cong., 2d Sess. 2 ("Senate Report"), *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5910 ("In many cases arising under our civil rights laws, the citizen who must sue to enforce the law has little or no money with which to hire a lawyer").

[6] In addition, as the United States notes, "many statutes with fee-shifting provisions—including [those at issue in this litigation]—do not allow plaintiffs to recover monetary damage awards from defendants." U.S. Br. at 20 n.19.

gress directed that attorney's fees awarded under fee-shifting provisions must be based on the standards governing attorney compensation in the private market. Thus, Congress explained that the reasonable fee awarded to a prevailing plaintiff should be computed in the same manner as fees for "attorneys compensated by a fee-paying client." Senate Report at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. Statutory fees, moreover, should "not be reduced because the rights involved may be nonpecuniary in nature." *Id.* Computing fees in this manner, Congress observed, will result in awards that "are adequate to attract competent counsel, but which do not produce windfalls to attorneys." *Id.* Accordingly, this Court has "consistently looked to the marketplace as [its] guide to what is 'reasonable'" (*Missouri* v. *Jenkins*, 491 U.S. 274, 285 (1989)), and has thus concluded that statutory fee awards must "be calculated according to the prevailing market rates in the relevant community" (*Blum* v. *Stenson*, 465 U.S. 886, 895 (1984)) in order to "yield the same level of compensation that would be available from the market." *Jenkins*, 491 U.S. at 286.

By assuring attorneys that they will be paid in accordance with the prevailing market rates if their clients prevail, statutory fee awards eliminate the most immediate disincentive to representation of federal litigants. Such awards, however, remain contingent upon success, and thus expose counsel to a number of significant risks. These include not only the possibility of loss, and thus of no recovery at all, but also the possibility that the case will require additional personnel whose salaries must be advanced pending an ultimate award, or that the case will crowd out other work that would be compensated fully. To achieve their goal of replicating the economic incentives that impel attorneys in the private market to undertake representation, statutory fee awards must compensate for these risks in a manner approximating the operation of the private market.

B. Private Market Forces, And Prevailing Ethical Standards, Permit The Recovery Of Enhanced Fees Where Attorneys Assume The Risks Of Nonpayment.

In the private market, attorneys often demand a premium, or enhancement, over standard billing rates to compensate for the risks they assume in undertaking contingent representation. Indeed, throughout this century, the legal profession has recognized that when attorneys accept representation on the understanding that they will be compensated only if their client prevails, they may reasonably charge a premium if their clients in fact do prevail. As early as 1908, the ABA Canons of Professional Ethics recognized that "[i]n determining the amount of the fee, it is proper to consider . . . the contingency of the compensation." [7] Both the ABA Model Code of Professional Responsibility, which was promulgated in 1969 and subsequently adopted in virtually every American jurisdiction (see *Nix* v. *Whiteside*, 475 U.S. 157, 167 n.4 (1986)), and the more recently promulgated ABA Model Rules of Professional Conduct, demonstrate the continuing consensus among the nation's lawyers that one of the "[f]actors to be considered" in determining a reasonable fee is "[w]hether the fee is fixed or contingent." [8]

The long-standing ethical precept reflected in these various codifications is founded on the unremarkable economic principle that, all other things being equal, certain payment is preferable to payment that is contingent on success. Like other economic actors, attorneys expect to be compensated for assuming the risk of nonpayment; if

[7] Canons of Professional Ethics, Canon 12(5), *reprinted in* ABA, *Opinions of the Committee with the Canons of Professional Ethics Annotated and Canons of Judicial Ethics Annotated* 48-49 (1967). The ABA adopted Canon 12 in 1908 as part of its first comprehensive code of professional ethics for attorneys. 33 ABA, *Reports of the American Bar Association* 578 (1908).

[8] *See* ABA Model Code of Professional Responsibility DR 2-106 (B) (1980); ABA Model Rules of Professional Conduct Rule 1.5 (a)(8) (1991).

they are not, few, if any, will agree to accept employment on a contingent basis.[9]

Thus, to replicate the economic incentives that operate in the private market—which are fully consistent with and supported by ethical standards—statutory fee awards must allow enhancement where attorneys assume risks that, in the private market, would justify recovery of a premium. It is difficult to imagine that Congress, in enacting a "reasonable attorney's fees" requirement, was not aware of the prevailing practice of charging a premium for the risk of nonpayment. See *infra* pp. 9-12. But in any event, to the extent statutory fee awards do not provide full compensation for such risks, attorneys will lack sufficient incentives to take such cases.[10] This disincentive will defeat the basic goal of fee-shifting legislation—ensuring " 'effective access to the judicial process' " for selected federal claims, *Hensley*, 461 U.S. at 429 (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976))—and ultimately will impair the substantive federal interests furthered by the procedural device of fee-shifting.

C. Congress Intended To Permit Recovery Of Fees Sufficient To Compensate For The Risks Inherent In Contingent Representation.

Not only are fee enhancements for risk of nonpayment fully consistent with the purposes of fee-shifting statutes, but it is clear that Congress intended to permit the recovery of such enhancements. As this Court has observed, "Congress was legislating in light of experience when it enacted the 1976 fee statute." *Blum*, 465 U.S. at 894 n.10. Prior to the enactment of § 1988, courts looked to ABA guidelines in determining the amount of reasonable statutory fee awards[11] and, consistent with DR 2-106 (B)(8) and Model Rule 1.5(a)(8), held that contingency of payment could justify an enhanced award.

The most notable example is *Johnson* v. *Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974), in which the Fifth Circuit adopted the factors set forth in DR 2-106 as guidelines for determining the size of attorney's fee awards under Title VII of the Civil Rights Act of 1964, including, specifically, "[w]hether the fee is fixed or contingent." *Id.* at 718 (emphasis omitted).[12] The Senate Report accompanying § 1988 expressly identifies the *Johnson* factors as "appropriate standards" for determining "reasonable" attorney's fees. Senate Report at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. In addition, as an example of a decision that "correctly applied" these factors, Congress cited (see *id.*) *Stanford Daily* v. *Zurcher*, 64 F.R.D. 680 (N.D. Cal. 1974), a case in which the district court concluded that it "must increase the [lodestar amount] . . . to reflect the

[9] F. B. MacKinnon, *Contingent Fees for Legal Services* 3-6 (1964) (enhancement for risk of nonpayment ensures that contingent employment is an economically attractive and feasible enterprise).

[10] *See Lewis* v. *Coughlin*, 801 F.2d 570 (2d Cir. 1986); *Ohio-Sealy Mattress Mfg. Co.* v. *Sealy Inc.*, 776 F.2d 646, 662 (7th Cir. 1985) (risk adjustment "provides an inducement for lawyers to accept meritorious cases that might otherwise go unheard"); *Yates* v. *Mobile County Personnel Bd.*, 719 F.2d 1530, 1534 (11th Cir. 1983) (if compensation is limited to the hourly rate charged in noncontingent employment, competent attorneys "could not afford to accept contingent employment").

[11] Such fee awards were expressly authorized by statutes, such as Titles II and VII of the Civil Rights Act of 1964 (see 42 U.S.C. §§ 2000a-3(b) and 2000e-5(k)), the provisions upon which § 1988 was patterned. *See Hensley* v. *Eckerhart*, 461 U.S. 424, 433 n.7 (1983). In addition, courts had awarded fees under the Reconstruction-era civil rights laws pursuant to their traditional equity powers prior to this Court's decision in *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240 (1975).

[12] The twelve factors identified in *Johnson* simply restated the eight factors in DR 2-106 and Model Rule 1.5, with one additional factor: the "undesirability" of the case. Compare *Johnson* with DR 2-106(B).

fact that the attorney's compensation, at least in part, was contingent in nature." *Id.* at 686.[13]

Congressional acceptance of risk adjustment in statutory fee awards is further underscored by its admonition that fees awarded under § 1988 should be equivalent to those awarded "in other types of equally complex Federal litigation, such as antitrust cases." Senate Report at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. Prior to enactment of § 1988, federal courts awarding attorney's fees in antitrust cases often permitted an upward adjustment in the fee to compensate for the contingency of payment.[14] Similarly, in other types of "complex Federal litigation" where fee-shifting was then permitted, courts often took account of the contingency of payment in determining a reasonable fee.[15]

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[13] Petitioner and its *amici* take great pains to parse these cases in the hopes of distinguishing them away, yet none can deny that, in endorsing *Stanford Daily*, Congress expressly approved an enhancement of fees based in part on the risk of nonpayment. *See* U.S. Br. at 25 ("The citation to *Stanford Daily* . . . does not *require* that the 'contingency' factor is to be treated any differently" than other *Johnson* factors subsumed within the "lodestar" calculation) (emphasis added). Moreover, neither petitioner nor its *amici* have identified anything in the legislative history that affirmatively supports their contention that Congress never intended to permit risk-based enhancements.

[14] *See, e.g., Lindy Bros. Builders, Inc.* v. *American Radiator & Standard Sanitary Corp.*, 487 F.2d 161, 168 (3d Cir. 1973); *City of Detroit* v. *Grinnell Corp.*, 495 F.2d 448, 471 (2d Cir. 1974); *Pacific Coast Agricultural Export Ass'n* v. *Sunkist Growers, Inc.*, 526 F.2d 1196, 1210 (9th Cir. 1975), *cert. denied*, 425 U.S. 959 (1976); *Arenson* v. *Board of Trade*, 372 F. Supp. 1349 (N.D. Ill. 1974).

[15] *National Treasury Employees Union* v. *Nixon*, 521 F.2d 317, 322 (D.C. Cir. 1975) (labor law class action); *Pete* v. *United Mine Workers Welfare & Retirement Fund of 1950*, 517 F.2d 1275, 1290 (D.C. Cir. 1975) (*en banc*) (similar); *Green* v. *Transitron Elec. Corp.*, 326 F.2d 492, 496 (1st Cir. 1964) (securities class action); *Angoff* v. *Goldfine*, 270 F.2d 185, 189 (1st Cir. 1959) (similar); *In re Osofsky*, 50 F.2d 925, 927 (S.D.N.Y. 1931) (bankruptcy).

In one such case, decided under the federal securities laws nearly 30 years ago, Judge Wyzanski noted that such enhancement is permissible because:

> [n]o one expects a lawyer whose compensation is contingent upon his success to charge, when successful, as little as he would charge a client who in advance had agreed to pay for his services, regardless of success.

Cherner v. *Transitron Elec. Corp.*, 221 F. Supp. 55, 61 (D. Mass. 1963), *modified and aff'd sub nom. Green* v. *Transitron Elec. Corp.*, 326 F.2d 492 (1st Cir. 1964).

Finally, in the years since the enactment of § 1988, risk-based enhancement of the "lodestar" in fee awards has been widely available. See generally 2 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 16.04[2] (1985) (collecting cases). During this period Congress has enacted a number of fee-shifting statutes, yet in none of them did it prohibit risk-based enhancement.[16] Had Congress wished to eliminate the possibility of such enhancements, it plainly could have and presumably would have done so,[17] but it did not. This acquiescence in

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[16] *See, e.g.*, National Cooperative Research Act of 1984, 15 U.S.C. § 4304(a)(1); Surface Mining Control and Reclamation Act of 1977, 30 U.S.C. § 1270(d); Comprehensive Older Americans Act Amendments of 1978, 42 U.S.C. § 6104(e)(1).

[17] *Cf.* Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (d)(2)(A) (in suits against the United States, "attorney fees shall not be awarded in excess of $75 per hour"). Pointing to the EAJA as evidence that "the public fisc is one of the interests Congress normally considers in enacting fee-shifting statutes" Brief of *Amici Curiae*, The District of Columbia and Several of the States ("State's Br.") at 10, the State *amici* argue that this interest counsels against recognition of risk enhancements. Even assuming that fee-shifting provisions applied only to governmental defendants—and plainly they do not—the State *amici* draw precisely the wrong conclusion from this evidence: because Congress knows how to protect the public fisc from fee awards and yet did not do so in the fee-

judicial recognition of risk-based fee enhancements is strong evidence of a congressional intent to permit such awards. Cf. *Herman & MacLean* v. *Huddleston*, 459 U.S. 375, 385-86 (1983) (Congress can be assumed to have endorsed—by failing to overturn—judicial interpretation that is "well-established").

In short, because fee-shifting statutes are designed to eliminate the disincentives to contingent federal representation and to place such representation on the same economic footing as representation in the private market, the reasonableness of statutory fee awards must be decided by the same determinants that govern attorney compensation in the private market. Accordingly, statutory fee awards must compensate for the risks of nonpayment in circumstances comparable to those which, in the private market for legal services, justify enhanced fees. Fee enhancements for such risks help to ensure that competent counsel will be attracted to federal claims, and thereby further the central objective of fee-shifting statutes. The various reasons advanced against such enhancements by petitioner and its *amici* do not justify the crabbed interpretation of the statute that they propose.

II. THE OBJECTIONS TO RISK-BASED FEE ENHANCEMENTS LACK MERIT.

Disregarding Congress' desire to permit fee awards for successful contingent federal claims to reflect the same economic incentives that establish attorney compensation in the private market, petitioner and its *amici* offer a number of policy reasons in support of their contention that risk-based enhancement should never be permitted. Thus, they argue that the "lodestar" methodology fully compensates successful litigants and that any

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shifting provisions at issue here, it must have intended to allow courts to establish fee awards under these provisions in a manner that approximates the compensation that normal market forces would provide.

enhancement necessarily constitutes an impermissible windfall; that risk-based fee enhancements are not necessary to attract competent counsel to federal claims; that enhancements impermissibly subsidize unsuccessful federal litigation; and that there are no manageable judicial standards to govern enhancement awards. As shown below, none of these objections has merit.

A. Compensation For Assuming The Risk Of Nonpayment Is Not Necessarily Subsumed Within The "Lodestar" Calculation.

Petitioner contends that the "lodestar" methodology of multiplying the reasonable number of hours by a reasonable hourly rate "necessarily reflects contingency considerations." Pet. Br. at 18. This is so, petitioner argues, because the selection of a reasonable hourly rate is made in light of the known fact that compensation under fee-shifting statutes is always contingent upon success. *Id.* at 17. Thus, petitioner concludes, "[a]ny enhancement of the lodestar based on contingent risk of loss . . . is inherently duplicative." *Id.* at 18.

This argument incorrectly assumes that the reasonable hourly rate used to calculate the lodestar is one that an attorney agrees to accept prior to undertaking representation of a federal litigant. Congress made clear, however, that attorneys representing federal litigants should be compensated in roughly the same manner "as . . . attorneys compensated by a fee-paying client." Senate Report at 6, *reprinted in* 1976 U.S. Code Cong. & Admin. News at 5913. The hourly rate used in the lodestar calculation, therefore, is not one to which the prevailing party and his or her attorney agreed, but the rate that prevails in the relevant market for attorneys of comparable skill and experience. *Blum*, 465 U.S. at 895 & n.11.[18]

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[18] Indeed, this Court has held that the particular contractual arrangements between prevailing parties and their counsel do not establish what a reasonable fee should be under the statute. *Blan-*

Although a prevailing party could recover fees reflecting compensation for the risk of nonpayment by proving the prevailing hourly rate charged by the market when payment is contingent on success,[19] typically the only ascertainable prevailing market rates—and thus those used in calculating the lodestar—are those charged to clients who pay for services regardless of outcome. Contrary to petitioner's assumption, these rates do not reflect contingency factors; rather, they reflect the level of compensation attorneys in the market expect to receive when payment is certain. Thus, adjusting a lodestar based on these rates does not entail any duplication.

Nor are risk-based enhancements inconsistent with the presumption that the lodestar establishes a reasonable fee. This presumption of reasonableness attaches to the lodestar because the latter typically reflects all the determinants that govern attorney compensation in the private market.[20] The presumption is not conclusive, however, and properly yields when a successful litigant is able to demonstrate that prevailing market rates do not include compensation for the risk of nonpayment and that the prevailing practice in the relevant market is to charge a premium over standard billing rates to reflect the economic yield necessary to induce attorneys to accept such risks.[21]

chard v. *Bergeron*, 489 U.S. 87, 94-96 (1989). As the ABA demonstrates below, the particular fee arrangement may be relevant in determining whether the prevailing party would have faced difficulties obtaining counsel, and thus may be relevant to determining whether a risk-based enhancement is appropriate.

[19] *See, e.g., Northcross* v. *Board of Educ.*, 611 F.2d 624, 638-39 (6th Cir.), *cert. denied*, 447 U.S. 911 (1979).

[20] *See Blum*, 465 U.S. at 898-900 ("novelty and complexity of the issues," "the special skill and experience of counsel," the "quality of representation," and the "results obtained" are presumably fully reflected in the lodestar); *Delaware Valley I*, 478 U.S. at 566 ("considerations concerning the quality of a prevailing party's counsel's representation normally are reflected in the reasonable hourly rate").

Indeed, to treat the lodestar as a complete restriction upon contingent attorney's fees places plaintiffs in a hopelessly disadvantageous position vis-a-vis defendants. In many cases, defendants have a battery of attorneys working at standard hourly rates who are compensated monthly for the reasonable hours they expend. By contrast, plaintiffs' counsel, who often are solo practitioners or work in small offices, are required to assume the entire risk of success plus the financial burden of delay in being compensated, yet at the end of the process will be compensated at a rate that is never greater than that received by the defense counsel who assumed no risk. Congress' purpose to create a more level playing field for plaintiffs pursuing important federal statutory objectives can only be served effectively by providing the prospect of a fee enhancement as an incentive for plaintiffs' lawyers to undertake representation at the outset.

B. In Appropriate Cases, Risk-Based Enhancements Are Necessary To Attract Competent Counsel.

Petitioner's supporting *amici* assert that contingency enhancements are unnecessary to ensure prosecution of meritorious claims under federal fee-shifting provisions. The United States, for example, points out that some plaintiffs will be affluent enough to hire lawyers on an

[21] The argument that recognition of risk-based enhancements is a policy judgment that Congress alone can make (States Br. at 24-26) is entirely misplaced. Congress has already made the policy judgment that attorneys representing successful federal litigants should be compensated in the same manner as attorneys who work for fee-paying clients. Whether a given fee award should include an enhancement for risk, therefore, turns not on any of the policy questions the State *amici* proffer (see *id.*), but on factual determinations concerning whether, and to what extent, the relevant legal market compensates for the risk of nonpayment. *Cf.* U.S. Br. at 13 n.13 (establishing relevant market rate is a "basic factual determination[]").

hourly basis and that some plaintiffs will have cases in which the likely damage recovery is large enough to attract counsel on an ordinary contingent-fee basis without regard to fee-shifting. See U.S. Br. at 16-17. Thus, the United States concludes, contingency enhancements are arguably necessary only in that "limited class of cases" where plaintiffs cannot afford to hire lawyers on a fee-paying basis and where they seek to bring cases in which liability is neither certain nor likely to result in a sizable damage award. *Id.* at 17.

As an initial matter, the United States offers no support for its assertion that the class of cases for which enhancement might be appropriate is "limited." Indeed, the United States itself acknowledges that "many statutes with fee-shifting provisions—including the SWDA and the Clean Water Act—do not *allow* plaintiffs to recover monetary damage awards from defendants." *Id.* at 20 n.19 (emphasis added).[22] In addition, as the United States concedes, there are many actions in which any damages recovered are likely to be relatively small.[23] Thus, far from being *de minimis*, the number of cases in the class the United States identifies is substantial.

[22] In fact, within the environmental protection area, "there are only two . . . fee shifting measures that are appended to causes of action which allow the recovery of damages." 1 M. Derfner & A. Wolf, *Court Awarded Attorney Fees* ¶ 5.03 [6] (Oct. 1991).

[23] For example, "many Title VII cases produce little or no monetary recovery, and therefore do not provide a basis for percentage-based contingency fees." U.S. Br. at 20 n.19. Other examples include 5 U.S.C. § 552a (permitting award of attorney's fees in action brought under the Privacy Act); 5 U.S.C. § 552b (same; Sunshine Act); and 29 U.S.C. § 216(b) (permitting award of attorney's fees in suit brought by employee under Fair Labor Standards Act to recover unpaid minimum wages or unpaid overtime compensation). This Court has recognized an entire class of cases alleging the deprivation of constitutional rights the prosecution of which is "importan[t] to organized society," but for which successful plaintiffs may be awarded only nominal damages. *Carey* v. *Piphus*, 435 U.S. 247, 266 (1978).

More important, the argument misses the point of statutory fee-shifting provisions. Congress enacted fee-shifting provisions precisely *in order* to make counsel available to prosecute meritorious federal cases for which the prospect of a large damage recovery was insufficient to attract counsel on the open market. In enacting § 1988, for example, Congress was very much aware that "the contingent fee arrangements that make legal services available to many victims of personal injuries would often not encourage lawyers to accept civil rights cases, which frequently involve substantial expenditures of time and effort but produce only small monetary recoveries." *City of Riverside* v. *Rivera*, 477 U.S. 561, 577 (1986) (plurality opinion). Thus, "Congress enacted § 1988 specifically to enable plaintiffs to enforce the civil rights laws even where the amount of damages at stake would not otherwise make it feasible for them to do so." *Id.*[24]

Nor does it matter that some plaintiffs will be affluent enough to hire lawyers without resorting to contingency arrangements. It could not be more plain that Congress' intent in enacting the fee-shifting provisions was not to protect those who already had access to the courthouse, but to protect those plaintiffs who did not. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 429 (1983) (Congress enacted § 1988 to provide "'effective access to the judicial process'" to persons who otherwise would not have their day in court) (quoting H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976)); see also H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976) ("Because a vast majority of the victims of civil rights violations cannot afford legal counsel, they are unable to present their cases to the courts"). Similarly, the existence of both "not-for-profit legal services organizations" and for-profit lawyers who

[24] These same concerns animate other federal fee-shifting provisions as well. *Cf. Delaware Valley I*, 478 U.S. at 559 (the purposes underlying § 1988 and fee-shifting provision found in Clean Air Act "are nearly identical").

are underemployed do not demonstrate that risk-based enhancements are unnecessary. See State Br. at 16-17. Congress long ago rejected the idea that the less-affluent should be relegated under fee-shifting statutes to lawyers who might be willing to take their case on a *pro bono* basis or whose skills are such that they remain underemployed and available for cut-rate work. See *Blum*, 465 U.S. at 894-95 (fee awards must mirror "prevailing market rates"); *Missouri* v. *Jenkins*, 491 U.S. 274, 283, 286 (1989) (same); *Yates* v. *Mobile County Personnel Bd.*, 719 F.2d 1530, 1534 (11th Cir. 1983) (enforcement of civil rights acts should not be "entrusted largely to less capable and less successful lawyers who lack sufficient employment").

In short, it is no answer to point out that contingency enhancements are needed only in cases where the market itself will not attract competent counsel. It is precisely those cases that motivated Congress to enact fee-shifting statutes.

C. Risk-Based Enhancements Do Not Improperly Compensate Persons Who Are Not "Prevailing Parties."

Petitioner's supporting *amici* contend that risk-based enhancements violate the requirement, common to all fee-shifting statutes, that fees be awarded only to a "prevailing" or "substantially prevailing" party. This argument, however, conflates and thereby confuses two separate statutory requirements: 1) a showing that the fee applicant "prevailed" and 2) a showing that the fees he or she seeks are "reasonable."

The "prevailing party" requirement is merely a statutory "threshold to a fee award of some kind." *Texas State Teachers Ass'n* v. *Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989). Once applicants cross this threshold, the fees they seek must be established in accordance with the statutory requirement of reasonableness, which depends analytically on the economic determinants

that govern attorney compensation in the relevant legal market. Whatever the amount of the fees established under this reasonableness standard, however, "it is the [prevailing] party, rather than the lawyer, who is . . . eligible" to receive them. *Venegas* v. *Mitchell*, 495 U.S. 82, 87 (1990); see also *Evans* v. *Jeff D.*, 475 U.S. 717, 731-32 (1986) (Congress did not "bestow[] fee awards upon attorneys"). Thus, only prevailing parties may recover fee awards, whether those awards are enhanced for risk of nonpayment or not. No non-prevailing party may recover them, and nothing in *amici*'s analysis demonstrates that this basic requirement of the statute would be violated.

Nevertheless, the *amici* supporting petitioner claim that risk-based enhancements violate the "prevailing party" requirement because such enhancements "[*i*]*n effect* . . . compensate attorneys for their unsuccessful efforts." U.S. Br. at 14 (emphasis added). This "effective cross-subsidy" argument is misconceived. ***First***, because, as just noted, fees are awarded to prevailing parties and not their attorneys, the cross-subsidy argument depends on the assumption that fee awards are passed on to attorneys who in turn devote themselves to representing other claimants under fee-shifting statutes. Prevailing parties, however, may often be represented by lawyers who otherwise represent fee-paying clients. In these not uncommon cases, there is no basis whatever to the claim that enhancements subsidize losing efforts brought on behalf of other federal litigants.

Second, even where enhanced fees are passed on to attorneys who represent other federal claimants, such fees compensate attorneys for assuming the *risk* of losing, not for actual losses. Enhancements reflect the additional yield that attorneys, like all other economic actors, require in order to devote profit-making resources to endeavors that may generate no return at all. Thus, a risk-based enhancement no more subsidizes an attorney's losing

efforts in other fee-shifting litigation than the premium that attorneys charge in non-federal contingent cases subsidizes the rates they charge fee-for-services clients. Because enhancements represent the direct economic reward for assuming the risk of nonpayment in the particular case, they remain "reasonable" within the meaning of the statute.

Third, even if the "cross-subsidy" characterization were otherwise accurate, this Court has already rejected the contention that, in calculating attorney's fees, courts may disregard prevailing market practices in order to prevent subsidization of other federal litigation. In *Blum* v. *Stenson*, the United States argued as *amicus curiae* that, because prevailing market rates incorporate operating expenses that may exceed the expenses of nonprofit legal services organizations, and because such rates include an element of profit unnecessary to attract nonprofit counsel, "fee awards based on market rates 'confer an unjustified . . . subsidy upon legal services organizations.'" 465 U.S. at 893 (quoting Brief for United States as *Amicus Curiae* at 6). This Court held unanimously that prevailing market practices nevertheless govern the determination of reasonable fees, and that "[t]he policy arguments advanced in favor of a cost-based standard [that would eliminate the risk of subsidization] should be addressed to Congress." *Id.* at 895-96.

D. There Are Judicially Manageable Standards To Govern Risk-Based Fee Enhancements.

The *Delaware Valley II* concurrence set forth a two-step inquiry to guide judicial determinations as to the availability and amount of risk-based fee enhancements. First, the fee applicant must demonstrate how the relevant market compensates for the risk of nonpayment. Second, the applicant must demonstrate that he or she would have faced substantial difficulties attracting counsel without the prospect of a fee enhancement. *Delaware Valley II*, 483 U.S. at 733.

Petitioner and its supporting *amici* argue that, because awarding risk-based enhancements under this two-step analysis entails asserted practical difficulties, such awards should never be permitted. The difficulties postulated, however, are neither so great nor so unique that they justify a complete refusal to consider whether prevailing market forces permit compensation for the risk of nonpayment. The *Delaware Valley II* concurrence's two-part test, slightly modified in the respects noted below, provides an entirely workable framework within which courts may properly adjust the lodestar to reflect the risk of nonpayment. In any event, to the extent that determinations of the "reasonableness" of fees necessary to ensure competent counsel for federal claimants entail difficulties, these concerns are unquestionably more properly addressed by Congress.

1. *Whether The Fee Applicant Would Have Faced Substantial Difficulties Attracting Competent Counsel.*

As an initial matter, of course, no risk-based enhancement can be awarded unless the fee applicant demonstrates that his or her attorney undertook representation on a contingent basis. Clearly, where the applicant pays for legal services regardless of outcome, the attorney has assumed no risk of nonpayment and the applicant can claim no entitlement to enhancement.[25] Beyond this obvious situation, there are a number of other, objectively-verifiable factors that courts can consider in determining whether the applicant would have faced substantial difficulties obtaining counsel (or, to put the matter differ-

[25] *See, e.g., Ohio-Sealy Mattress Mfg. Co.* v. *Sealy Inc.*, 776 F.2d 646, 660 (7th Cir. 1985); *Jones* v. *Central Soya Co.*, 748 F.2d 586, 592 (11th Cir. 1984). In addition, if the applicant agreed to pay some portion of the lodestar amount, regardless of outcome, the attorney has undertaken the case on a partially contingent basis, and the applicant cannot seek enhancement of any portion of the attorney's work that was not at risk. *See, e.g., Stanford Daily* v. *Zurcher*, 64 F.R.D. 680, 686 (N.D. Cal. 1974).

ently, whether the attorney was capable of mitigating the risk of nonpayment).[26]

Thus, applicants who had the financial wherewithal to pay for the services rendered, whether or not they in fact agreed to pay for them, will generally be unable to demonstrate that they could not have obtained legal counsel.[27] Similarly, applicants whose claims carried the potential for damage recoveries large enough to induce attorneys to take their cases on a percentage of recovery basis should have been able to attract competent counsel.[28] And in cases where the standard of liability is or approaches that of strict liability [29] so that, as a generic matter, the risk of failure—and thus of nonpayment—is insubstantial, applicants will not be able to demonstrate an inability to obtain competent counsel. In each of these situations, economic forces operating in the private market for legal services could be expected to ensure that the claimants secured representation. While such applicants remain eligible to recover attorney's fees in the amount of the lodestar (see *Venegas* v. *Mitchell*, 495 U.S. at 88), they ordinarily would not receive any enhancement of that figure.

Conversely, however, where applicants demonstrate that the factors outlined above are absent, they normally should be eligible for an award of enhanced fees if the

[26] If counsel can take reasonable steps to limit or mitigate the risk of nonpayment, the counsel presumably will be likely to accept the representation. Accordingly, Congress' fundamental purpose in enacting fee-shifting provisions will be served.

[27] A court's inquiry into this factor would be comparable to that which an attorney, faced with a client of modest but limited means, might undertake. Of course, the bar would be able effectively to assist the court in making such a determination.

[28] *See, e.g., Venegas* v. *Mitchell*, 495 U.S. 82 (1990).

[29] An example of such cases would be those brought to enforce effluent discharge limitations under the Clean Water Act. *See* U.S. Br. at 17 n.16.

relevant legal market generally would compensate for the risk of nonpayment. Such applicants have demonstrated that neither the generic nature of the case (*e.g.*, a strict liability claim), common economic arrangements (*e.g.*, a percentage-of-recovery contract), nor their own resources permitted the attorney to mitigate the risk of nonpayment. Because economic forces in the legal market would not normally attract counsel to the claims of these applicants based solely on the availability of a lodestar award, no further particularized inquiry into the plaintiff's actual difficulties in retaining counsel should be necessary.[30] Accordingly, the supposed evils of an actual difficulties test (see U.S. Br. at 18-23) need not arise.[31]

[30] The fact that the fee applicant, "by definition, . . . stands before the court with counsel" (*King* v. *Palmer*, 950 F.2d 771, 780 (D.C. Cir. 1991) (*en banc*), *petition for cert. filed*, Feb. 21, 1992, is neither fatal to, nor inconsistent with, a claim for a fee enhancement. In this case, counsel for respondents reasonably could have expected an enhancement given the law at the time the decision to represent respondents was made. If so, the availability of an enhancement would become the reason for eliminating enhancements generally, an obviously perverse result.

In addition, many applicants will be represented by attorneys whose motivations are non-economic. *See, e.g., Blum*, 465 U.S. at 892-96. Moreover, because fee-shifting provisions were designed to place contingent federal representation *as a whole* on the same economic footing as private fee-for-services representation, the relevant inquiry for fee enhancement purposes is not the individual attorney's assessment of the strength or weakness of a particular case, but the presence or absence of factors that, as a general rule, will induce or deter representation in the private market.

[31] These evils are thought to include penalizing defendants with the strongest cases, asking judges to decide whether they would have decided cases differently, and creating conflicts of interest between attorneys (who presumably will highlight the weaknesses of their cases for enhancement purposes) and clients. These concerns are exaggerated. The concern for "penalizing" defendants with strong cases rests on the unexamined assumption that a plaintiff's chances of prevailing are inversely proportional to the defendant's culpability. In fact, as most practitioners recognize, a host of

2. *The Extent To Which The Relevant Market Compensates For The Risk Of Nonpayment.*

Fee applicants who clear the substantial difficulties hurdle must then prove 1) that the relevant market compensates attorneys for assuming the risk of nonpayment and 2) the amount of such compensation. Contrary to the arguments advanced by petitioner's supporting *amici*, this inquiry does not pose insurmountable conceptual difficulties. In fact, determining the extent to which the relevant market compensates for the risk of nonpayment is conceptually no different than the "basic factual determinations" that underlie the calculation of the lodestar.

The United States argues that courts cannot determine whether the market compensates for risk of nonpayment by looking to the relevant market for the underlying claim (such as attorneys who handle Title VII or Clean Water Act cases), because these markets are almost entirely dependent on fee-shifting provisions for compensation. U.S. Br. at 20. Yet, courts routinely look to precisely these markets to establish the prevailing market rate for lodestar purposes. There is no logical basis for concluding that the hourly rates quoted by such attorneys reflect market forces but that the amount of enhancement

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factors such as burdens of proof, the availability of evidence, disparities in resources, and the complexity of underlying issues can all have a greater impact on the outcome of a case than the defendant's culpability; indeed, willful violations in which defendants seek to disguise their wrongdoing may be the most difficult to prove. Judges, moreover, can be trusted to recognize these practical difficulties and attorneys, who will receive nothing if they lose, can be trusted to try to overcome them.

In the ABA's view, an actual difficulties test, which requires an examination of the merits of the applicant's case, is improper because the purpose of enhancement is not to equalize prospective returns among different contingent cases with different degrees of merit, but to place federal contingent practice as a whole on the same economic footing as fee-for-services representation.

these attorneys require for assuming the risk of nonpayment does not. Moreover, courts can assess the propriety of enhancement claims by checking them against the prevailing practices of practitioners of comparable skill, reputation and experience in other private markets.

Nor is there any merit to the concern that, because fee applicants lack incentives to control costs, they will routinely agree to enhancements, thereby saddling defendants with unfair fees. The lack of cost controls is no more an attribute of enhancements than it is of any other aspect of attorney compensation under fee-shifting statutes. In calculating the lodestar, courts can and do routinely adjust both hourly rates and total hours to ensure that the fees losing defendants pay reflect the same degree of "billing judgment" that attorneys representing fee-paying clients would exercise. See *Hensley* v. *Eckerhart*, 461 U.S. 424, 434 (1983).

Moreover, a fee applicant's failure to oppose fee agreements that include contingency enhancements (see U.S. Br. at 20-21) does not determine whether an enhancement should be awarded; rather, it is the absence or presence of objectively-verifiable factors that, in the private market, would govern a prospective litigant's ability to retain competent counsel that controls the availability of enhancement. Accordingly, there is no inherent danger that enhancements will become a "self-fulfilling prophecy" (*id.* at 21); courts are fully capable of preventing this problem.

Ultimately, the objections to market-based fee enhancements rest not on any theoretical or conceptual difficulties, but on an inherent distrust of the evidence used to prove such enhancements. Opponents of enhancements categorically dismiss affidavits proffered by attorneys in the relevant markets as "anecdotal in content and self-interested in motivation." States Br. at 17; see also U.S. Br. at 21 n.20 ("self-serving, *post hoc* affidavits"); *King* v. *Palmer*,

950 F.2d 771, 779 (D.C. Cir. 1991) (*en banc*) (affidavits "obviously self-interested"). Whatever may be said about the economic motivations of the successful counsel in a particular fee application, sweeping disparagements of entire sub-markets of the local bar simply cannot provide a proper basis for refusing to undertake the economic inquiry that fee-shifting provisions entail.[32] Defendants can proffer contrary evidence, in the form of affidavits or otherwise, or mount other challenges to the validity of a fee applicant's evidence. If such efforts fail, however, they should not be able to rebut an applicant's evidentiary showing on the theory that other officers of the court cannot be trusted to tell the truth in sworn statements.

Finally, this Court's ability to evaluate the judiciary's capacity to make fee enhancement determinations on the basis of reported cases is distorted because of the lack of clarity in the law concerning the availability of fee enhancements. Only by adopting standards akin to those proposed herein and allowing courts to apply them over a period of time can the Court meaningfully evaluate the ability of the judiciary to make fee enhancement judgments. But even if the practical problems asserted by petitioner and its *amici* were more plainly demonstrable, they would not provide a basis for this Court to interpret the term "reasonable" in a manner that guarantees that a form of compensation available to attorneys in the private market is categorically foreclosed to those who represent federal claimants. Instead, if the process is unmanageable, it is Congress, not this Court, that should

[32] This Court's decision in *United States Dep't of Labor* v. *Triplett*, 494 U.S. 715 (1990), lends no support to blanket condemnations of attorney affidavits. In *Triplett*, this Court observed that an appellate court's reliance on the statements of three attorneys provided an insufficient basis upon which to declare a presumptively permissible federal regulatory scheme unconstitutional. *See id.* at 723-24. Moreover, in *Triplett*, there was considerable evidence, including statements by other attorneys, rebutting the substance of the three affidavits. *Id.* at 724.

modify the "reasonableness" standard. Absent congressional action, this Court should permit fee enhancement for contingent recovery to ensure that Congress' purpose of ensuring plaintiffs access to the courts for claims arising under statutes subject to fee-shifting provisions is fulfilled.

CONCLUSION

The holding of the court of appeals that fee-shifting statutes authorize a fee enhancement in appropriate circumstances should be affirmed.

Respectfully submitted,

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April 13, 1992

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